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IN THE  
**Supreme Court of the United States**

October Term, 1978

No. 79-163

FREDERICK J. HOPMANN,  
*Petitioner*

v.

SOUTHERN PACIFIC TRANSPORTATION  
COMPANY,  
*Respondent*

**Petition For Writ Of Certiorari To The  
Court of Civil Appeals For The Twelfth  
Supreme Judicial District Of Texas**

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**FREDERICK J. HOPMANN**  
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v.

**SOUTHERN PACIFIC TRANSPORTATION  
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**Petition For Writ Of Certiorari To The  
Court of Civil Appeals For The Twelfth  
Supreme Judicial District Of Texas**

\_\_\_\_\_  
*To The Honorable, The Chief Justice and Associate  
Justices of the Supreme Court of the United States:*

Frederick J. Hopmann, the petitioner herein, prays that a writ of certiorari issue to review the judgment of The Court of Civil Appeals for the Twelfth Supreme Judicial District of Texas entered in the above-entitled case on May 3, 1979.

### OPINIONS BELOW

The opinion of The Court of Civil Appeals for the Twelfth Judicial District of Texas is unreported and is printed in Appendix A hereto, *infra*, page A-1. The judgment of The Court of Civil Appeals for the Twelfth Supreme Judicial District of Texas is printed in Appendix D hereto, *infra*, page D-3. The Order Sustaining Defendant's Plea of Privilege of the 113th Judicial District Court of Harris County, Texas is printed in Appendix D hereto, *infra*, page D-1.

### JURISDICTION

The judgment of The Court of Civil Appeals for the Twelfth Supreme Judicial District of Texas (Appendix D, *infra* page D-3) was entered on May 3, 1979. A timely petition for rehearing was denied on May 31, 1979 (Appendix C, *infra*, page C-18). The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1257(3).

Jurisdiction of this Court is authorized by 28 U.S.C. § 1257(3) because petitioner has received judgment from the highest court in the State from which a decision could be had.

The Texas Supreme Court has jurisdiction in a case only when such jurisdiction is conferred upon it by the statutes and Constitution of the State. Article V., Section 3 of the Texas Constitution outlines the general parameters of Texas Supreme Court jurisdiction.<sup>1</sup> This Article is modified and supplemented by certain Articles of the Texas Revised Civil Statutes including Articles 1728 and

1. Tex. Const., Art. V., § 3. Appendix B.

1821.<sup>2</sup> Subsection 3 of Article 1728 confers jurisdiction on the Texas Supreme Court in appeals involving the construction and validity of statutes necessary to a determination of the case. Since this case involves just such an appeal it seemingly falls under the jurisdiction of the Texas Supreme Court. But Subsection 5 of Article 1821 provides that judgments of the Court of Civil Appeals are final and that no writ of error shall be allowed from the Supreme Court in an appeal from an interlocutory order unless there is dissent among the Justices of the Court of Civil Appeals or a conflict of decisions with another Texas Court of Civil Appeals or the Supreme Court.

The Texas Supreme Court in *State v. Wynn*, 301 S.W. 2d 76 (Tex. Sup. Ct., 1957) held that these two Articles should be looked at contemporaneously and in case of a conflict Article 1821 should control. The Court, *per curiam*, said:

"For [Texas] Supreme Court jurisdiction to attach in the absence of special statutory provision, it is not only necessary that a cause come within the authorizing clauses of Article 1728, but also that it not be precluded by the prohibition of Article 1821." 301 S.W.2d 76, 78.

The case at bar deals with an interlocutory order of the trial court concerning proper venue. There is neither a dissent among the Justices of the Court of Civil Appeals for the Twelfth Supreme Judicial District of Texas nor is there a conflict of decisions with another Texas Court of Civil Appeals or the Supreme Court. Therefore under Article 1821 the Texas Supreme Court lacks jurisdiction

2. Vernon's Ann. Civ. St., Art. 1728. Appendix B. Vernon's Ann. Civ. St., Art. 1821. Appendix B.



in this case. The Texas Supreme Court addressed this exact issue in *Torrez v. Maryland Casualty Company*, 363 S.W.2d 235 (Tex. Sup., 1962). The court held that the Texas Supreme Court lacked jurisdiction to review the judgment of the Court of Civil Appeals rendered on appeal from an interlocutory venue order even though the construction and validity of a statute was involved. This means that in going to the Court of Civil Appeals petitioner has reached the highest court in the state with jurisdiction over the matter. The only recourse for justice left for petitioner is the Supreme Court of the United States.

### QUESTION PRESENTED

Whether the Texas Venue Statute, Vernon's Annotated Texas Statutes (herein V.A.T.S.), Art. 1995, § 25, construed as being mandatory, is unconstitutional because it denies substantial federal rights granted under the Federal Employer's Liability Act, 45 U.S.C. § 56, and thereby thwarts the express purpose of the Act.

### STATUTES AND CONSTITUTIONS INVOLVED

This case involves that part of the Federal Employer's Liability Act, 45 U.S.C. § 56, which deals with venue:

"Under this chapter an action may be brought in a district court of the United States, in the district of residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States."

This case also involves 28 U.S.C. § 1257(3):

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

\* \* \*

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or law of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States."

This case also involves the Texas Venue Statute, V.A.T.S., Art. 1995, § 25:

"No person who is an inhabitant of this State shall be sued out of the county in which he has his domicile except in the following cases:

\* \* \*

25. Railway personal injuries—Suits against railroad corporations, or against any assignee, trustee or receiver operating any railway in this State, for damages arising from personal injuries, resulting in death or otherwise, shall be brought either in the county in which the injury occurred, or in the county in which the plaintiff resides at the time of the injury. If the defendant railroad corporation does not operate its railway in, or through, the county in which the plaintiff resided at the time of the injury, and has no agent in said county, then said suit shall be brought either in the county in which the injury

occurred, or in the county nearest that in which the plaintiff resided at the time of the injury, in which the defendant corporation runs or operates its road, or has any agent. When an injury occurs within one-half mile of the boundary line dividing two counties, suit may be brought in either of said counties. If the plaintiff is a non-resident of this State then such suit shall be brought in the county in which the injury occurred, or in the county in which the defendant railroad corporation has its principal office."

This case also involves V.A.T.S. Art. 1728, §§ 1, 2, 3, 6:

"The Supreme Court shall have appellate jurisdiction co-extensive with the limits of the State, extending to all questions of law arising in the following cases when same have been brought to the Courts of Civil Appeals from appealable judgment of trial courts:

1. Those in which the judges of the Court of Civil Appeals may disagree upon any question of law material to the decision.

2. Those in which one of the Courts of Civil Appeals holds differently from a prior decision of another Court of Civil Appeals, or of the Supreme Court upon any question of law material to a decision of the case.

3. Those involving the construction or validity of statutes necessary to a determination of the case.

\* \* \*

6. In any other case in which it is made to appear that an error of substantive law has been committed by the Court of Civil Appeals which affects the judgment, but excluding those cases in which the

jurisdiction of the Court of Civil Appeals is made final by statute."

This case also involves V.A.T.S., Art. 1821, § 5:

"Except as herein otherwise provided, the judgments of the Courts of Civil Appeals shall be conclusive on the law and facts, nor shall a writ of error be allowed thereto from the Supreme Court in the following cases, to wit:

\* \* \*

5. In all appeals from interlocutory orders appointing receivers or trustees, or such other interlocutory appeals as may be allowed by law.

It is provided, however, that nothing contained herein shall be construed to deprive the Supreme Court of jurisdiction of any case brought to the Court of Civil Appeals from an appealable judgment of the trial court in which the judges of the Courts of Civil Appeals may disagree upon any question of law material to the decision, or in which one of the Courts of Civil Appeals holds differently from a prior decision of another Court of Civil Appeals or of the Supreme Court upon a question of law, as provided for in Subdivisions (1) and (2) of Article 1728."

This case also involves the Due Process and Equal Protection clauses of the 14th Amendment to the Constitution of the United States:

"No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; . . . nor deny to any person within its jurisdiction the equal protection of the laws."

### STATEMENT OF CASE

This is a suit brought by an injured brakeman against his railroad employer under the Federal Employers' Liability Act. The trial court granted defendant railroad's plea of privilege to have venue changed from state district court in Harris County, Texas, where petitioner filed suit, to state district court in Bexar County, Texas. Petitioner appealed this decision to the Texas Court of Civil Appeals and that court affirmed the order of the trial court and has since also denied petitioner's timely motion for rehearing. (Appendix D).

Petitioner Hopmann was seriously injured on June 23, 1977 while performing his duties as a brakeman and sued the railroad under the Act (45 U.S.C. § 51, et seq.) for failing to supply him with reasonably safe equipment and a reasonably safe place to work. Appellant was a resident of Bexar County, Texas at the time of the accident and the injury occurred in Caldwell County, Texas.

Defendant Southern Pacific Transportation Company was at all material times doing business in Harris County, Texas. For venue purposes, the railroad resides and is domiciled in Harris County, Texas.

Section 56 of the Act provides that plaintiff may bring suit where the defendant resides and does business. Section 25 of the Texas Venue Statute permits the plaintiff in a suit against the railroad for personal injuries to bring suit only where the plaintiff resides or where the cause of action arose. Both the trial court and the Texas Court of Civil Appeals ruled that the provisions of the Texas Venue Statute are mandatory in a state court proceeding under the federal Act.

Petitioner raised the issue of the constitutionality of a mandatory interpretation of the Texas Venue Statute (Sub. 25, Art. 1995) at the trial level in his Memorandum Brief in Opposition to Defendant's Plea of Privilege. (Appendix C). At the appellate level petitioner again raised the issue in his brief. (Appendix C).

Both courts ruled that the Texas Venue Statute is mandatory and that it takes precedence over the venue provisions of the federal Act.

### REASONS FOR GRANTING WRIT

This case concerns the rights of Texas citizens to receive the full protection of the Federal Employer's Liability Act (45 U.S.C. § 51, et seq.). Section 56 of the Act provides that a suit brought under the Act may be brought (a) where the defendant resides; (b) where the cause of action arose; or (c) where the defendant does business.

In *Boyd v. Grand Trunk Western Ry. Co.*, 338 U.S. 263, 70 S.Ct. 26, 94 L.Ed. 55 (1948), this Court made it clear that the venue rights provided in the Act were substantial rights. The Court struck down an agreement restricting the employees rights as to venue:

"The right to select the forum granted in § 6 is a *substantial right*. It would thwart the *express purpose* of the Federal Employer's Liability Act to sanction defeat of that right by the device at bar." *Boyd*, supra, p. 266 (emphasis added).

In contrast to the federal Act, subsection 25 of the Texas Venue Act (Vernon's Ann. Civ. St. art. 1995, § 25) provides that in a personal injury suit against a



railroad suit shall be brought (a) where the plaintiff resides, or (b) where the accident occurred. This subsection contains no provision to allow a plaintiff to sue a defendant railroad where the <sup>plaintiff</sup> later resides or does business.

Texas in this case has construed subsection 25 of Article 1995 to be mandatory. If that is so then plaintiff is denied a substantial right guaranteed by federal law. Indeed, the opinion below recognizes that the injured employee's venue options are substantial rights, but says that the injured employee gives up those right by filing his suit in state court. Here is the way the Texas court put this view of federal rights:

"The FELA claimant is given the election to sue in the federal court or the state court. Where he chooses to sue in the federal court, the right to select the forum granted by the federal statute constitutes a substantial right which the various states may not defeat. *Boyd v. Grand Trunk Western Ry. Co.*, 338 U.S. 263, 70 S.Ct. 26, 94 L.Ed. 55 (1949); *Missouri Pacific Railroad Company v. Little*, supra. The substantial right granted, however applies only to the right to maintain venue in accordance with the federal Act in cases filed in the federal courts. Where the injured employee chooses to sue in the state courts, his suit is subject to the venue statutes of the state." p. 4, Tex. Civ. App. opinion, (p. A-8, Appendix A).

In *Arnold v. Panhandle and Santa Fe Railway Co.*, 353 U.S. 360, 77 S.Ct. 840, 1 L.Ed.2d 889 (1957), this Court made it clear that rights granted by this Act were not to be disregarded at the state level, especially by technicalities of Texas procedures:

"The petitioner having asserted Federal rights governed by federal law, it is our duty under the Act to make certain that they are fully protected, as the Congress intended them to be. We, therefore, cannot accept interpretations that nullify their effectiveness, for . . . the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."

*Arnold*, supra, p. 361.

This Court reached the same conclusion in *McKnett v. St. Louis & S. F. Ry. Co.*, 292 U.S. 230, 54 S.Ct. 690, 78 L.Ed. 1227 (1934). An Alabama court said it did not have jurisdiction over a foreign corporation when the cause of action did not arise in Alabama. This action by the Alabama court was contrary to an express provision of the Act, just as Texas' subsection 25 is by virtue of being mandatory. In reversing the Alabama court's decision, the Supreme Court said:

"A state may not discriminate against rights arising under Federal laws."

*McKnett*, supra, p. 234.

In a later FELA case the Supreme Court made this point even more clear:

"Moreover, only if Federal law controls can the Federal Act be given that uniform application throughout the country essential to effectuate its purpose." *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359, 361, 72 S.Ct. 312, 96 L.Ed. 398 (1952).

If subsection 25 of the Texas Statute (V.A.T.S. Art. 1995) is mandatory then it destroys a substantial right



given petitioner by the federal Act and thereby goes against established Supreme Court case law and violates the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

Ever since the Federal Employers Liability Act became law in 1908 the railroads have attempted to amend the Act in order to limit the venue provisions so as to be more favorable to them. In 1947 a bill was introduced in the United States House of Representatives that would have changed Section 56 of the Act to read very much like the more restrictive Texas statute pertaining to railroad personal injury cases. Congress rejected the proposed amendment and has since refused to water down the venue provisions of the Act to make them more favorable to the railroads. During the House Judiciary Committee Hearings on the proposed amendment in 1947 it was noted that:

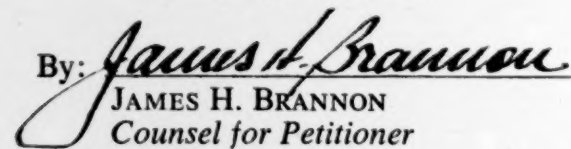
“Congress purposely gave great latitude to the injured party in bringing his suit against the wrongdoer in the forum most convenient to the complainant.” (Hearings on HR 1639, 80th Congress, 1st Session, 1947, p. 61).

Congress clearly intended to make the prospect of the individual railroad worker suing the railroad corporation less awesome to the railroad worker by allowing suit to be brought wherever the railroad may be found. A mandatory interpretation of the Texas Venue Statute severely limits the rights which the United States Congress saw fit to give the railroad workers and petitioner respectfully submits that for this reason such a mandatory interpretation of the Texas statute makes it unconstitutional.

### CONCLUSION

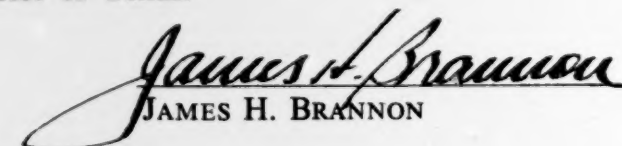
Wherefore, petitioner respectfully prays that a writ of certiorari be granted, and for all other appropriate relief.

Respectfully submitted,

By:   
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### CERTIFICATE OF SERVICE

I hereby certify that on the 27 day of July, 1979, all counsel of record were duly delivered a copy of the above and foregoing Petition for Writ of Certiorari to the Court of Civil Appeals for the Twelfth Supreme Judicial District of Texas.

  
 JAMES H. BRANNON

A-1

**APPENDIX A**

**IN THE COURT OF CIVIL APPEALS  
TWELFTH SUPREME JUDICIAL DISTRICT  
OF TEXAS  
TYLER, TEXAS**

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NO. 1210

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**FREDERICK J. HOPMANN, Appellant**

**v.**

**SOUTHERN PACIFIC TRANSPORTATION  
COMPANY, Appellee**

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**Appeal From The 113th Judicial District Court  
Of Harris County, Texas**

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This is a venue case. Appellant, Frederick J. Hopmann, brought suit in the district court of Harris County, Texas, under the Federal Employer's Liability Act, 45 U.S.C.A., subsection 51, et seq., seeking to recover damages for personal injuries sustained while employed as a brakeman for appellee, Southern Pacific Transportation Company. The incident was alleged to have occurred on June 23, 1977, at Luling, Caldwell County, Texas. Appellant alleged in his petition that he was a resident of Bexar County, Texas, at the time of the occurrence in question and that the appellee was a railroad cor-

poration engaged in interstate commerce doing business in Harris County, Texas, where it maintained its offices and place of business.

Appellee duly filed a plea of privilege to have the cause transferred to Caldwell County, Texas, or in the alternative, to Bexar County, Texas, relying upon Article 1995, subdivision 25, Vernon's Annotated Texas Civil Statutes. Appellant responded with a controverting affidavit alleging that under Article 1995, supra, venue was properly laid in Harris County due to the fact that appellant does business in Harris County and maintains its offices and principal place of business there. After a hearing before the court, without a jury, the trial court sustained Southern Pacific's plea of privilege and ordered that the cause be transferred to Bexar County, Texas, from which order appellant perfected this appeal.

On the venue hearing, it was stipulated that: (1) plaintiff was employed by defendant, Southern Pacific Transportation Company, on the date of his alleged injury on July 23, 1977; (2) the injury occurred in Caldwell County, Texas; (3) at the time of his injury plaintiff was a resident of Bexar County, Texas; (4) that at all times material to this suit Southern Pacific Transportation Company was doing business in Harris County, Bexar County and Caldwell County; (5) that for the purpose of venue only, it was stipulated that plaintiff's pleading alleged a cause of action for venue purposes under the Federal Employer's Liability Act, and that all necessary facts to support the pleading had been established; and (6) that if the plea of privilege was sustained by the trial court, it was stipulated that plaintiff's suit would be transferred to Bexar County, Texas.

Under the first point, appellant contends that the trial court erred in transferring the cause to Bexar County because federal law governs, and under Title 45, U.S.C.A., subsection 56, this suit was properly brought in Harris County.

Subsection 56 of the Federal Employer's Liability Act provides, in part, as follows:

"Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States."

Appellant takes the position that since the Act provides that the jurisdiction of the federal and state courts shall be concurrent, the state courts are obligated to apply the venue provisions provided by the Act. He argues that the right to select the forum and maintain suit in any county where appellee does business, is a substantial right granted by congress, and to apply subdivision 25 of the Texas Venue Statute would deny him that right and would thwart the express purpose of the Federal Employer's Liability Act.

The railroad company, on the other hand, contends that venue is controlled by subdivision 25 of Article 1995, supra, the material part of which reads as follows:

"25. Railway personal injuries.—Suits against railroad corporations, or against any assignee, trustee or receiver operating any railway in this State, for

damages arising from personal injuries, resulting in death or otherwise, shall be brought either in the county in which the injury occurred, or in the county in which the plaintiff resided at the time of the injury. . . .”

In our view, the precise issue now presented was previously decided in *Missouri Pacific Ry. Co. v. Little*, 319 S.W.2d 785 (Tex. Civ. App.—Houston 1958, no writ history, cert. den., 80 S.Ct. 69, 194). In the *Little* Case, the railroad employee brought suit against his employer for personal injuries sustained in McLennan County, Texas. At the time of the accident, plaintiff was a resident citizen of McLennan County, and his injuries occurred while he and his employer were engaged in interstate commerce. The action was brought under the Federal Employer’s Liability Act and suit was filed in Houston, Harris County, Texas. At the state district court level, the plaintiff’s employer, Missouri Pacific Ry. Co., sought, by way of plea of privilege, to remove the cause to the county in which the plaintiff resided and in which he sustained the injury. Missouri Pacific based its contention on Article 1995, subdivision 25, *supra*, just as the appellant does in this case. The district court overruled the railroad’s plea of privilege and the railroad appealed. The Houston Court of Civil Appeals reversed the case and ordered the cause transferred to McLennan County. In holding that subdivision 25 of the Texas Venue Statute (Article 1995) was controlling and that the venue provisions of section 56 of the Federal Employer’s Liability Act were not applicable to suits filed in state courts, the court of civil appeals stated at page 787:

“It is perfectly obvious that in the first sentence of the second paragraph of Section 56 the Congress

was undertaking to establish the venue of suits under the Federal Employers’ Liability Act brought in ‘*a district court of the United States*.’ (Emphasis supplied.) Nothing is said concerning the venue of an action that is brought in a state court.

“The legal doctrine that the clear expression of the one excludes the other is so ancient that it comes down to us in the time-honored maxim ‘*expresso unius est exclusio alterius*.’

“After prescribing venue in the United States courts, Section 56 then provides, ‘The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.’ This provision is concerned with jurisdiction, not venue.”

In support of its decision the court of civil appeals cited the case of *Miles v. Illinois Central Ry. Co.*, 1942, 315 U.S. 698, 62 S.Ct. 827, 86 L.Ed. 1129, involving a Federal Employer’s Liability Act case, wherein the court stated at page 788:

“‘Words were simultaneously adopted recognizing the jurisdiction of the state courts by providing that the federal jurisdiction should be concurrent. *The venue of state court suits was left to the practice of the forum.*’ (Emphasis ours.)”

In *Baltimore & Ohio Ry. Co. v. Kepner*, 1941, 314 U.S. 44, 62 S.Ct. 6, 86 L.Ed. 28, the Supreme Court held that a state could not validly exercise its equitable jurisdiction to enjoin a resident of the state from prosecuting a cause of action arising under the Federal Employer’s Liability Act in the federal court of another state, since under the supremacy clause the venue section of the federal Act was controlling. While the ruling in that



regard is irrelevant to the present inquiry, it is significant to note that in the course of the opinion the Supreme Court made this statement at page 9 of 62 S.Ct.: "*Section 6 (45 U.S.C.A. sec. 56) establishes venue for an action in the federal courts.*" (Emphasis ours.)

We have found no case, and have been cited none, holding that venue provisions of sec. 56 of the federal statute is applicable to actions filed in a state court. The statements made by the United States Supreme Court in the cases cited above clearly indicate that Section 56 of the Act is to be interpreted as establishing venue for an action in the federal courts and that venue in state court actions are controlled by the venue statutes of the forum. Since appellant filed his suit in the Texas court, the federal venue statute was not applicable. Accordingly, appellant's first point is overruled.

Under the second point, appellant contends that the provisions of subdivision 25 of Article 1995, *supra*, are not mandatory but were enacted for the benefit of the plaintiff, thus giving him a right to elect to either follow subdivision 25 or to sue appellant at its domicile in Harris County.

It has long been the law in this state that subdivision 25 of Article 1995 is mandatory and that suits controlled by this subdivision must be commenced in the particular county mentioned therein without reference to whether or not it is the domicile of the defendant. *Lewis v. Gulf, C. & S.F. Ry. Co.*, 229 S.W.2d 395 (Tex. Civ. App.—Galveston 1950, writ *dism'd*); *Texas & N.O.R. Co. v. Tankersley*, 246 S.W.2d 253 (Tex. Civ. App.—San Antonio 1952, no writ); *Missouri Pacific Ry. Co. v. Little*, *supra*; see also *Kinney v. McCleod*, 9 Tex. 78 (1852).

In *Lewis v. Gulf, C. & S.F. Ry. Co.*, *supra* at 397, the Galveston court summarized the rights of the parties under the mandatory provisions of Article 1995 in the following language:

"It is well settled that if a suit is brought under the provisions of any of the mandatory subdivisions above referred to, the defendant is entitled to have the case transferred to the county provided for in such mandatory provision, regardless of defendant's residence, upon the filing of the proper plea."

Applying the foregoing rules of law to the facts of the present case, it is obvious that appellant cannot maintain venue in Harris County, Texas, in face of the mandatory provision of the Texas statute providing otherwise. Appellant's second point of error is overruled.

By the third and final point, appellant argues that if subdivision 25 of Article 1995 is mandatory, then it is unconstitutional because it denies substantial federal rights. Specifically, he contends that if subdivision 25 is mandatory it is unconstitutional because it not only deprives him of one of the substantial rights given to him by the federal Act, but also it discriminates against him and causes a lack of uniformity in the application of the federal Act. However, no authority is cited for this proposition. After considering appellant's argument, we are convinced that it is without merit.

The F.E.L.A. claimant is given the election to sue in the federal court or the state court. Where he chooses to sue in the federal court, the right to select the forum granted by the federal statute constitutes a substantial right which the various states may not defeat. *Boyd v. Grand Trunk Western Ry. Co.*, 338 U.S. 263, 70 S.Ct.

26, 94 L.Ed. 55 (1949); *Missouri Pacific Railroad Company v. Little*, supra. The substantial right granted, however, applies only to the right to maintain venue in accordance with the federal Act in cases filed in the federal courts. Where the injured employee chooses to sue in the state courts, his suit is subject to the venue statutes of the state. *Miles v. Illinois Central Ry. Co.*, supra; *Missouri Pacific Ry. Co. v. Little*, supra. It is clear that the Congress did not intend to give the F.E.L.A. claimant who files suit in the state court the same venue rights as those provided for in suits filed in the federal court, otherwise the Congress would have said so. When appellant elected to file his suit in the state court, he no longer had federal venue rights subject to protection. Consequently, the application of the Texas venue statute would not defeat or curtail any of appellant's federal venue rights. Since the Texas venue statute deprived him of no federal right, it follows that it could not be unconstitutional and void on such grounds.

Further, we find that we are unable to agree with appellant's contention that the mandatory provisions of subdivision 25 of Article 1995 renders the Texas statute discriminatory and in violation of the 14th Amendment of the Constitution of the United States. This same question was addressed by the Court in *Missouri Pacific Ry. Co. v. Little*, supra. After reviewing the Texas statute in question, the court in that case concluded, at page 788, that the statute fully protects the plaintiff and could not, in any way, be construed as discriminatory. After a careful review of the statute, we are convinced that the court in that case reached the proper result and that the statute should not be struck down on that basis.

It follows from what we have said that we are of the opinion that appellant had no legal or constitutional right to maintain venue in Harris County, Texas.

Accordingly, the judgment of the trial court is affirmed.

JAMES H. MOORE  
Associate Justice

Opinion delivered May 3, 1979.

**APPENDIX B**

**TEXAS STATUTES**

Art. 1728. [1521] [940] [1011] Appellate jurisdiction

The Supreme Court shall have appellate jurisdiction co-extensive with the limits of the State, extending to all questions of law arising in the following cases when same have been brought to the Courts of Civil Appeals from appealable judgment of trial courts:

1. Those in which the judges of the Courts of Civil Appeals may disagree upon any question of law material to the decision.

2. Those in which one of the Courts of Civil Appeals holds differently from a prior decision of another Court of Civil Appeals, or of the Supreme Court upon any question of law material to a decision of the case.

3. Those involving the construction or validity of statutes necessary to a determination of the case.

4. Those involving the revenues of the State.

5. Those in which the Railroad Commission is a party.

6. In any other case in which it is made to appear that an error of substantive law has been committed by the Court of Civil Appeals which affects the judgment, but excluding those cases in which the jurisdiction of the Court of Civil Appeals is made final by statute. Acts 1892, p. 19; Acts 1913, p. 107; Acts 1917, p. 140; G.L. vol. 10, p. 383; Acts 1927, 40th Leg., p. 214, ch. 144, § 1; Acts 1953, 53rd Leg., p. 1026, ch. 424, § 1.

Art. 1821. [1591] [996] Judgment conclusive on law

Except as herein otherwise provided, the judgments of the Courts of Civil Appeals shall be conclusive on the law

and facts, nor shall a writ of error be allowed thereto from the Supreme Court in the following cases, to wit:

1. Any civil case appealed from the County Court or from a District Court, when, under the Constitution a County Court would have had original or appellate jurisdiction to try it, except in probate matters, and in cases involving the Revenue Laws of the State or the validity or construction of a Statute.

2. All cases of slander.

3. All cases of divorce.

4. All cases of contested elections of every character other than for State officers, except where the validity of a Statute is questioned by the decision.

5. In all appeals from interlocutory orders appointing receivers or trustees, or such other interlocutory appeals as may be allowed by law.

6. In all other cases as to law and facts except where appellate jurisdiction is given to the Supreme Court and not made final in said Courts of Civil Appeals.

It is provided, however, that nothing contained herein shall be construed to deprive the Supreme Court of jurisdiction of any case brought to the Court of Civil Appeals from an appealable judgment of the trial court in which the judges of the Courts of Civil Appeals may disagree upon any question of law material to the decision, or in which one of the Courts of Civil Appeals holds differently from a prior decision of another Court of Civil Appeals or of the Supreme Court upon a question of law, as provided for in Subdivisions (1) and (2) of Article 1728. Acts 1st C.S. 1892, p. 25; Acts 1923, p. 110; Acts

1929, 41st Leg., p. 68, ch. 33, § 1; Acts 1953, 53rd Leg., p. 1026, ch. 424, § 2.

Art. 1995. [1830] [1194] [1198] Venue, general rule

No person who is an inhabitant of this State shall be sued out of the county in which he has his domicile except in the following cases:

\* \* \*

25. Railway personal injuries.—Suits against railroad corporations, or against any assignee, trustee or receiver operating any railway in this State, for damages arising from personal injuries, resulting in death or otherwise, shall be brought either in the county in which the injury occurred, or in the county in which the plaintiff resided at the time of the injury. If the defendant railroad corporation does not run or operate its railway in, or through, the county in which the plaintiff resided at the time of the injury, and has no agent in said county, then said suit shall be brought either in the county in which the injury occurred, or in the county nearest that in which the plaintiff resided at the time of the injury, in which the defendant corporation runs or operates its road, or has an agent. When an injury occurs within one-half mile of the boundary line dividing two counties, suit may be brought in either of said counties. If the plaintiff is a nonresident of this State then such suit shall be brought in the county in which the injury occurred, or in the county in which the defendant railroad corporation has its principal office.

\* \* \*



## TEXAS CONSTITUTION

## Article V

## § 3. Jurisdiction of Supreme Court; writs; sessions; clerk

Sec. 3. The Supreme Court shall have appellate jurisdiction only except as herein specified, which shall be co-extensive with the limits of the State. Its appellate jurisdiction shall extend to questions of law arising in cases of which the Courts of Civil Appeals have appellate jurisdiction under such restrictions and regulations as the Legislature may prescribe. Until otherwise provided by law the appellate jurisdiction of the Supreme Court shall extend to questions of law arising in the cases in the Courts of Civil Appeals in which the Judges of any Court of Civil Appeals may disagree or where the several Courts of Civil Appeals may hold differently on the same question of law or where a statute of the State is held void. The Supreme Court and the Justices thereof shall have power to issue writs of habeas corpus, as may be prescribed by law, and under such regulations as may be prescribed by law, the said courts and the Justices thereof may issue the writs of mandamus, procedendo, certiorari and such other writs, as may be necessary to enforce its jurisdiction. The Legislature may confer original jurisdiction on the Supreme Court to issue writs of quo warranto and mandamus in such cases as may be specified, except as against the Governor of the State.

The Supreme Court shall also have power, upon affidavit or otherwise as by the court may be determined, to ascertain such matters of fact as may be necessary to the proper exercise of its jurisdiction.

The Supreme Court shall appoint a clerk, who shall give bond in such manner as is now or may hereafter,

be required by law, and he may hold his office for four years and shall be subject to removal by said court for good cause entered of record on the minutes of said court who shall receive such compensation as the Legislature may provide. As amended Aug. 11, 1891; Nov. 4, 1930.

## FEDERAL STATUTES

## § 56. Actions; limitations; concurrent jurisdiction of courts

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States. Apr. 22, 1908, c. 149, § 6, 35 Stat. 66; Apr. 5, 1910, c. 143, § 1, 36 Stat. 291; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167; Aug. 11, 1939, c. 685, § 2, 53 Stat. 1404; June 25, 1948, c. 646, § 18, 62 Stat. 989.

## § 1257. State courts; appeals; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

#### UNITED STATES CONSTITUTION

##### Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

#### APPENDIX C

NO. 1872

#### IN THE COURT OF CIVIL APPEALS FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

---

FREDERICK J. HOPMANN,  
Appellant

v.

SOUTHERN PACIFIC TRANSPORTATION  
COMPANY, Appellee

---

#### BRIEF FOR APPELLANT

---

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#### PRINTER'S NOTE:

Index for Brief Omitted

NO. 1872

IN THE COURT OF CIVIL APPEALS  
FOR THE FOURTEENTH SUPREME JUDICIAL  
DISTRICT OF TEXAS

---

FREDERICK J. HOPMANN,  
Appellant

v.

SOUTHERN PACIFIC TRANSPORTATION  
COMPANY, Appellee

---

BRIEF FOR APPELLANT

---

To The Honorable Court Of Civil Appeals:

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from the trial court's Order granting Appellee's Plea of Privilege to transfer this cause of action out of Harris County, where it was filed. (Tr. 14).

Appellant, an employee of Appellee, was seriously injured on June 23, 1977 while performing his duties as a brakeman. Appellant sued under the Federal Employers Liability Act (45 U.S.C.A. § 51, et. seq.) for failing to supply him with reasonably safe equipment and a reasonably safe place to work. Appellant was a resident of Bexar County at the time of the accident and the injury occurred in Caldwell County.

Defendant-Appellee Southern Pacific Transportation Company was at all material times doing business in Harris County as stipulated in the Statement of Facts, page 4. For venue purposes, the railroad resides and is domiciled in Harris County.

Appellee filed a Plea of Privilege on January 11, 1978 to move the cause of action either to the county where the accident occurred or where Appellant resided. (Tr. 6) Appellant filed an Amended Controverting Plea to Defendant's Plea of Privilege. (Tr. 11)

The Trial Judge upheld Defendant's Plea of Privilege. (Tr. 14) It is from that Order that Appellant has perfected this appeal.

FIRST POINT OF ERROR

THE TRIAL COURT ERRONEOUSLY SUSTAINED APPELLEE'S PLEA OF PRIVILEGE BECAUSE FEDERAL LAW GOVERNS AN FELA CASE AND UNDER 45 U.S.C.A., § 56 THIS SUIT WAS PROPERLY BROUGHT IN HARRIS COUNTY.

ARGUMENT AND AUTHORITIES

The present venue provisions of the FELA were adopted by amendment on April 5, 1910. The Amendment provides for an FELA suit to be brought (a) where the defendant resides; (b) where the cause of action arose; or (c) where the defendant does business. 45 U.S.C.A. § 56.

These rights were given to the plaintiff in order to equalize what Congress felt was an inherently disproportionate bargaining power between the railroads and their



employees. In *Boyd v. Grand Trunk Western Ry. Co.*, 338 U.S. 263, 70 S.Ct. 26, 94 L.Ed. 55 (1948), the Supreme Court struck down an agreement restricting the employees rights as to venue. In doing so the Court used this language:

"The right to select the forum granted in § 6 is a *substantial right*. It would thwart the *express purpose* of the Federal Employer's Liability Act to sanction defeat of that right by the device at bar." *Boyd*, supra, p. 266 (emphasis added)

The significance of the venue provisions is not only attested to by this particular case but also by the railroads' repeated efforts to change them and Congress' adamant stand to preserve them (Hearings on HR 1639, 80th Congress, 1st Session, 1947). During these hearings on the FELA venue provisions in 1947, it was noted that

"Congress purposely gave great latitude to the injured party in bringing his suit against the wrongdoer in the forum most convenient to the complainant." (HR, supra, p. 61)

This shows not only that plaintiff has these rights but that they are substantial rights to be guaranteed by the courts. Texas courts have recognized that substantial rights of the FELA may not be undermined by any "local statute, rule of decision, or forms of local practice." *Texas & P. Ry. Co. v. Younger*, 262 S.W.2d 557, 560 (Ft. Worth Civ. App., 1953, ref. n.r.e.)

Appellee cited at the plea of privilege hearing the case of *Missouri Pacific Railroad Co. v. Little*, 319 S.W.2d 785 (Houston Civ. App., 1958, Cert. denied, 80 S.Ct. 69, 194) as holding that state venue provisions govern

FELA actions filed in state courts. In that case the court suggested (p. 788) that venue at the defendant's residence was not a substantial right of the injured railroad employee. In *Little* the court in reaching its decision relied on this dictum of the U.S. Supreme Court in *Miles v. Illinois Central Ry. Co.*, 315 U.S. 698, 703, 62 S.Ct. 827, 86 L.Ed. 1129 (1942):

"The venue of state court suits was left to the practice of the forum."

However, in *Miles* the court was not faced with a venue provision which was contrary to the federal Act. The Supreme Court in *Burnett v. New York Central Railroad Co.*, 380 U.S. 424, 425, 85 S.Ct. 1050, 13 L.Ed.2d 94 (1965) was faced with an Ohio statute, similar to Texas', which was apparently contrary to the FELA venue provisions. This case was reversed on other grounds but conspicuous in its absence was any approval by the Court of the Ohio venue statute. In fact, the Court hinted in footnote 1 (85 S.Ct. at 1053) that this type of restriction might be unconstitutional. Plaintiff submits that the venue provisions of the FELA are to govern in this case because they are substantial rights and any undermining of these provisions would be contrary to the purposes of the Act. Therefore, the Court should overrule Appellee's Plea of Privilege as contrary to Federal law.

## SECOND POINT OF ERROR

THE TEXAS VENUE STATUTE (SUB. 25, ART. 1995) IS NOT MANDATORY AS THE EXCEPTIONS LISTED THEREUNDER ARE FOR THE BENEFIT OF THE PLAINTIFF AND DO NOT RESTRICT THE GENERAL VENUE PROVISION.



### ARGUMENT AND AUTHORITIES

Even if it is found that state venue law governs, Appellee's Plea of Privilege fails because under state law this case is properly brought in Harris County, Appellee's domicile. Subdivision 25 of Article 1995 provides that in a railroad personal injury case, suit shall be brought (a) where the plaintiff resides, or (b) where the accident occurred. Article 1995 contains the exceptions to the general venue provision that the defendant has the right to be sued in the county of his residence. The exceptions to the general venue provision are generally recognized to be for the benefit of the plaintiff not the defendant. *Warren v. Denison*, 531 S.W.2d 215, 217 (Amarillo Civ. App., 1975, no writ).

In *Commercial Standard Ins. Co. v. Texas & N.O.R. Co.*, 198 S.W.2d 913 (Ft. Worth Civ. App., 1946, no writ) the defendant railroad was being sued by the injured employee's insurance company in a "compensation recoupment suit". The railroad filed a Plea of Privilege to be sued only at its residence which was sustained by the trial court. In answering appellant-insurance company's claim that Subsection 25 was mandatory the Court of Appeals said this:

"We disagree with appellant's statement in its brief to the effect that Sec. 25 does not provide for venue to be in appellee's resident county. We find it is a protective statute which guarantees appellee venue in its home county, if the exceptions set out in said Section are not applicable." *Commercial Standard Ins. Co.*, supra, p. 916.

The case of *Fouse v. Gulf C. & S.F. Ry. Co.*, 193 S.W. 2d 241 (Ft. Worth Civ. App., 1946, no writ) also as-

sumed that Subsection 25 was not mandatory. In this action plaintiffs resided and were injured in Johnson County, the defendant railroad was domiciled in Galveston County, and suit was brought in Tarrant County. The railroad filed a plea of privilege to move the case to Galveston County and the plaintiffs asked to either keep the case in Tarrant County or move it (under Subdivision 25) to Johnson County. The Court sent the case to Galveston County which would be improper if Subsection 25 is mandatory. Also, the language of the Court's opinion clearly shows that they felt Subdivision 25 was *not* mandatory.

"In other words, these plaintiffs, had they chosen to do so, *could have brought this personal injury suit in the district court of Galveston County*, and no one could have questioned their right to do so." *id* at 244. (emphasis added)

One Texas case has held in an FELA action that Subsection 25 is mandatory so that the railroad could move the case from its domicile to the place of the injury. *Lewis v. Gulf C. & S.F. Ry. Co.*, 229 S.W.2d 395 (Galveston Civ. App., 1950, writ dismissed). We submit that the *Lewis* case is wrong. However, the opinion makes no mention of the venue provisions of the FELA, or of their impact on Texas venue rules.

### THIRD POINT OF ERROR

IF SUBDIVISION 25 OF ARTICLE 1995 IS MANDATORY THEN IT IS UNCONSTITUTIONAL BECAUSE IT DENIES SUBSTANTIAL FEDERAL RIGHTS TO BE GUARANTEED BY THE STATE COURTS.

### ARGUMENT AND AUTHORITIES

Seven (7) years after the *Lewis* case, *supra*, the U. S. Supreme Court rejected a Texas holding in a similar situation (i.e., where the Texas Courts purported to be simply following state "procedure" in submitting a case to the jury), saying:

"The petitioner having asserted Federal rights governed by federal law, it is our duty under the Act to make certain that they are fully protected, as the Congress intended them to be. We, therefore, cannot accept interpretations that nullify their effectiveness, for . . . the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Arnold v. Panhandle and Santa Fe Railway Co.*, 353 U.S. 360, 361, 77 S.Ct. 840, 1 L.Ed.2d 889 (1957).

As mentioned earlier, the U. S. Supreme Court in *Boyd* decided that the plaintiff's right to venue is a substantial right. The Supreme Court has a history of looking closely at state actions or statutes which defeat one of the express purposes of a Federal law. In *McKnett v. St. Louis & S. F. Ry. Co.*, 292 U.S. 230, 54 S.Ct. 690, 78 L.Ed. 1227 (1934) an Alabama Court said they did not have jurisdiction over a foreign corporation when the cause of action did not arise in their state. This action by the Alabama Court was contrary to an express provision of the FELA, just as Texas' Subdivision 25 would be if it is mandatory. In reversing the Alabama Court's decision, the Supreme Court said:

"A state may not discriminate against rights arising under Federal laws." *McKnett*, *supra*, p. 234.

In a later FELA case the Supreme Court made this point even clearer:

"Moreover, only if Federal law controls can the Federal Act be given that uniform application throughout the country essential to effectuate its purpose." *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359, 361, 72 S.Ct. 312, 96 L.Ed. 398 (1952).

If Subdivision 25 is mandatory as Appellee contends then it is unconstitutional because it destroys one of the substantial rights given to the plaintiff by the Federal Act. Subdivision 25, if mandatory, discriminates against plaintiff's rights and causes there to be a lack of uniformity in the application of the Act.

*Burnett*, *supra*, p. 425 (footnote 1) suggests that a venue statute similar to Texas' might be unconstitutional. The Court did not answer it directly in that case because they were able to reverse on other grounds. However, a state statute which diminishes the rights of the party intended to benefit from the FELA and enhances the right of the railroad, the party to be regulated, is unconstitutional under the doctrine set out by the Supreme Court in *Boyd*, *McKnett*, and *Arnold*. Therefore, Appellant submits that if Subdivision 25 is mandatory as to him then it is unconstitutional. It denies Due Process and violates the Equal Protection clauses; both under the Fourteenth Amendment to the Constitution of the United States.

### CONCLUSION AND PRAYER

Appellant submits that Federal law governs an FELA case and under 45 U.S.C.A. § 56 this suit was properly

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brought in Harris County. In the alternative, if this Court rules state law governs, Appellant submits that Subdivision 25 of Article 1995 is not mandatory and would be so contrary to Federal law if it is mandatory that it is unconstitutional.

Appellant prays that this Honorable Court reverse and render the trial court's action in sustaining Appellee's Plea of Privilege.

Respectfully submitted,

SCHMIDT & MATTHEWS

By: \_\_\_\_\_  
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Attorneys for Appellant

**CERTIFICATE OF SERVICE**

I hereby certify that on the 13th day of June, 1978, a true and complete copy of the above and foregoing Brief for Appellant was served upon Appellee's attorney of record by hand delivering a copy of same to Mr. W. T. Womble, 913 Franklin Avenue, Houston, Texas, 77002.

\_\_\_\_\_  
JAMES H. BRANNON

C-11

NO. 1,147,334

\_\_\_\_\_  
IN THE  
DISTRICT COURT OF HARRIS COUNTY, TEXAS  
113TH JUDICIAL DISTRICT

\_\_\_\_\_  
FREDERICK J. HOPMANN

v.

SOUTHERN PACIFIC TRANSPORTATION  
COMPANY

\_\_\_\_\_  
MEMORANDUM BRIEF IN OPPOSITION  
TO DEFENDANT'S PLEA OF PRIVILEGE

\_\_\_\_\_  
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Telephone: 223-4466  
*Attorneys for Plaintiff*



To The Honorable Judge Of Said Court:

I.

Plaintiff is an employee of defendant railroad, who was injured on the job, and this suit is brought under the "Federal Employers' Liability Act", 45 U.S.C.A. §§ 51-60.

The railroad filed a plea of privilege to move the case away from its county of residence (Harris).

Plaintiff controverted this plea and the railroad insists that the case must be transferred under Subdivision 25 of Article 1995, Vernon's Annotated Texas Statutes, which the railroad argues is mandatory.

Plaintiff urges this Court to overrule the plea of privilege, because Federal law governs an FELA case, and under Federal law the suit is properly brought in Harris County. Suit in Harris County is also proper under Subdivision 27 of Article 1995 pertaining to foreign corporations.

A. *Venue Under FELA.*

The present venue provisions under the FELA were adopted April 5, 1910. These amended venue provisions were adopted because prior to them venue was limited to the place of business of the railroad. The Amendment permitted (and to this day permits) an FELA suit in Federal Court to be brought (a) where the defendant resides; (b) where the cause of action arose; or (c) where the defendant does business. 45 U.S.C.A. § 56.

These venue provisions represent substantial rights of the FELA plaintiff. The United States Supreme Court in

striking down an agreement on venue between the railroad and the injured employee, said in a 1949 case:

"The right to select the forum granted in § 6 is a substantial right." *Boyd v. Grand Trunk Western Ry. Co.*, 338 U.S. 263, 70 S.Ct. 26, 94 L.Ed. 55.

In fact, attempts have been made to change them so that suit could only be brought either (a) where the plaintiff resides, or (b) where the accident occurred (HR 1639, 80th Congress, 1st Session, 1947). These attempts have failed, but they illustrate the importance of the FELA venue provisions—the railroads were still fighting them 37 years after they were adopted!

The Supreme Court of Iowa had this to say about state legislation restricting plaintiff's choice of forum:

"With respect to a right arising under the Constitution or Laws of the United States the decision of the Courts of the United States is controlling upon the state court. [citations omitted]. It necessarily follows that Chapter 293 of the Acts of the Thirty-Seventh General Assembly cannot operate to prevent one claiming under the Federal Employer's Liability Act from bringing suit in any court, where, under that act, he is authorized to sue." *Payne v. Knapp*, 197 Iowa 737, 198 N.W. 62 (1924).

B. *Texas Venue (Sub. 25, Art. 1995).*

Subdivision 25 was enacted in 1901, at just about the same time as the United States Congress was considering the original "Federal Employers' Liability Act".

Our Texas venue statute is more accommodating to the railroads; in 1901 they wielded enormous political



power in Texas. Subdivision 25 to Article 1995 reflects precisely what the railroads were unsuccessfully trying as late as 1947 to pass through Congress: in a railroad personal injury case, suit shall be brought (a) where the plaintiff resides, or (b) where the accident occurred.

The effect then is to turn the FELA on its head: you can sue the railroad where it resides in Federal Court, but you cannot in state court. For some reason, railroads no longer like being sued where they reside. All this in a state where we have the general philosophy—expressed in Article 1995—that a defendant has the right to be sued in the county of his domicile (residence).

Two cases have dealt with whether or not Subdivision 25 is “mandatory” so that the plaintiff simply cannot sue the defendant railroad where it resides. These cases seem to disagree on the “mandatory” nature of Subdivision 25.

1. In *Fouse v. Gulf C. & S. F. Ry. Co.*, 193 S.W.2d 241 (Ft. Worth Civ. App., 1946, no writ) the plaintiffs resided and were injured in Johnson County, the defendant railroad was domiciled in Galveston County, and suit was brought in Tarrant County. The railroad’s plea of privilege asked that the case be moved to Galveston County, and the plaintiffs asked to either keep it in Tarrant County or move it (under Subdivision 25) to Johnson County.

The Court sent the case to Galveston County, which would be improper if Subdivision 25 is “mandatory”. As the Court said:

“The plea of privilege is a creature of the law enacted for the benefit of the defendant. Only the exceptions thereto are enacted for the benefit of the plaintiffs.” (*id* at 244)

2. One Texas case has held in an FELA case that Subdivision 25 is mandatory, so that the railroad, sued in its domicile (Galveston) by an employee, could move the case to the county of injury—which also happened to be the county of plaintiff’s residence (Hardin). Had the plaintiff sued in Federal Court sitting at Galveston, he could have (under 45 U.S.C.A. § 56) had his case tried there rather than in Hardin County. *Lewis v. Gulf C. & S. F. Ry. Co.*, 229 S.W.2d 395 (Galveston Civ. App., 1950, writ dismissed). We submit that this case is wrong. The battle over venue provisions of the FELA demonstrates that it is an important right for the plaintiff to be able to sue the railroad where 45 U.S.C.A. § 56 permits.

The point here presented was not discussed in the *Lewis* case, i.e. that substantial Federal rights were being trenches upon by the Texas venue statute. In fact, it was not until 7 years after the *Lewis* case that the U. S. Supreme Court rejected a Texas holding in a similar situation, saying:

“The petitioner having asserted federal rights governed by federal law, it is our duty under the Act to make certain that they are fully protected, as the Congress intended them to be. We therefore, cannot accept interpretations that nullify their effectiveness, for ‘... the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.’” *Arnold v. Panhandle and Santa Fe Railway Co.*, 353 U.S. 360, 361, 77 S.Ct. 840, 841 (1957).

Plaintiff submits that if Subdivision 25 is mandatory, it is unconstitutional. See *Burnett v. New York Central Railroad Company*, 380 U.S. 424 (footnote 1, p. 425), 85 S.Ct. 1050 (1965).

One other problem with calling Subdivision 25 mandatory is that it does not tell us which county to send the case to—Jim Wells (where plaintiff resides) or Nueces (where the accident occurred). With one possible exception (Subdivision 29, Libel and Slander) the mandatory subdivisions are quite specific as to where the case shall be filed, and only one county is possible. Since that is not true with respect to Subdivision 25, it is not clear that the Legislature was forcing (rather than simply permitting) plaintiff to sue the defendant railroad away from its county of residence.

#### CONCLUSION AND PRAYER

Plaintiff has sued defendant where it resides and where it does business in Texas, so that under Federal law (45 U.S.C.A. § 56) Harris County is a proper county to sue in; and under Article 1995, Subdivision 27, as set out in plaintiff's Amended Controverting Plea, Harris County is where defendant foreign corporation has an agency or representative, and its principal office in Texas, so that under state law venue is proper in Harris County. Therefore, the plea of privilege, since it attempts to invoke Subdivision 25 and that subdivision is not mandatory in an FELA case, should be overruled. Plaintiff so prays.

Respectfully submitted,

SCHMIDT & MATTHEWS

By: \_\_\_\_\_

JAMES H. BRANNON  
*Attorneys for Plaintiff*

#### CERTIFICATE OF SERVICE

I hereby certify that on the \_\_\_\_\_ day of \_\_\_\_\_, 1978, a true and correct copy of the above and foregoing Memorandum Brief In Opposition To Defendant's Plea Of Privilege, was duly deposited in the United States Postal Service, certified mail, return receipt requested, to the attorney of record for the Defendant in this matter, Mr. W. T. Womble, 913 Franklin Avenue, Houston, Texas, 77001, and on the same date the original of said Memorandum Brief was duly filed with the Clerk of the above referenced Court.

\_\_\_\_\_  
JAMES H. BRANNON

NO. 1210

IN THE COURT OF CIVIL APPEALS  
TWELFTH SUPREME JUDICIAL DISTRICT  
OF TEXAS  
TYLER, TEXAS

FREDERICK J. HOPMANN,  
Appellant

v.

SOUTHERN PACIFIC TRANSPORTATION  
COMPANY,  
Appellee

## APPELLANT'S MOTION FOR REHEARING

## TO THE HONORABLE COURT OF CIVIL APPEALS:

COMES NOW Appellant, Frederick J. Hopmann, and files this his Motion for Rehearing pursuant to Rule 458 of the Texas Rules of Civil Procedure, and moves this Court to set aside its decision rendered on the 3rd day of May, 1979, affirming the Judgment of the Trial Court in favor of Appellee, to grant Appellant a rehearing and to withdraw the opinion handed down on the 3rd day of May, 1979, and to reverse the Judgment of the Trial Court.

In support of this Motion for Rehearing, Appellant presents the following Assignments of Error:

## FIRST ASSIGNMENT OF ERROR

The Court erred in overruling Appellant's First Point of Error because Federal law governs an FELA case and venue in Harris County is proper under Federal law.

## SECOND ASSIGNMENT OF ERROR

The Court erred in overruling Appellant's Second Point of Error because the Texas Venue Statute (Sub. 25, Art. 1995) is not mandatory.

## THIRD ASSIGNMENT OF ERROR

The Court erred in overruling Appellant's Third Point of Error because if Subdivision 25 of Article 1995 is mandatory then it is unconstitutional.

## ARGUMENT

This Court, in its Opinion handed down the 3rd of May, 1979, stated:

"It is clear that the Congress did not intend to give the FELA claimant who files suit in the state court for the same venue rights as those provided for in suits filed in the federal court, otherwise the Congress would have said so. . . ."

Conversely, can it not be said that if the Congress had not intended for the FELA venue provisions to be concurrent with that of state courts why did Congress not limit an injured railroad employee's forum to a Federal court only? Congress gave the injured railroad employee two forums to choose from, i.e. Federal court or state court. If the venue provisions of Sec. 56 of the FELA are not applicable to actions filed in state court, as this Court has held in its Opinion, why did Congress give the injured railroad worker the option of filing in a state court? Therefore, the right to select the forum, as granted by this Federal statute, constitutes a substantial right which the various states may not defeat. Why is it being

defeated here? The Court recognizes that venue constitutes a substantial right in its opinion.

This Court has held that Subdivision 25 of Article 1995 is mandatory and not unconstitutional as to this Appellant. Any ruling that usurps a Federal right governed by Federal law is unconstitutional. Since the Federal act was enacted to protect the rights of injured railroad employees, and since Federal rights are governed by Federal law, the FELA venue provisions would govern an FELA case, and Subdivision 25 of Article 1995 would govern all other personal injury lawsuits brought in the State of Texas against a railroad.

WHEREFORE, PREMISES CONSIDERED, Appellant respectfully prays that this Court grant this Motion for Rehearing, that the opinion handed down on the 3rd day of May, 1979, be withdrawn and the affirmation of the Judgment of the trial court be in all things vacated, set aside and annulled.

Respectfully submitted,

SCHMIDT, MATTHEWS &  
BRANNON

By: \_\_\_\_\_  
JAMES H. BRANNON  
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Attorneys for Appellant,  
Frederick J. Hopmann

# CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of May, 1979, a true and correct copy of the above and foregoing Pleading was duly hand delivered to attorney of record for Defendant, Mr. W. T. Womble, Crain, Caton, James & Oberwetter, 3300 Two Houston Center, Houston, Texas, 77002; and on the same date the original of said pleading was duly filed with the District Clerk of Harris County, Texas to be filed among the papers of this cause.

\_\_\_\_\_  
JAMES H. BRANNON



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**APPENDIX D**

NO. 1,157,849

IN THE  
DISTRICT COURT OF HARRIS COUNTY, TEXAS  
113TH JUDICIAL DISTRICT

FREDERICK J. HOPMANN

v.

SOUTHERN PACIFIC TRANSPORTATION  
COMPANY

**ORDER SUSTAINING DEFENDANT'S  
PLEA OF PRIVILEGE**

On the 13th day of March, 1978, the Court, after hearing and considering Defendant's Plea of Privilege and Plaintiff's Controverting Plea, and to the evidence and argument of counsel thereon, is of the opinion that the Plea of Privilege should be sustained.

It is therefore ordered that Defendant's Plea be sustained, and that the cause of action alleged against Defendant in the suit styled and numbered above be transferred to the \_\_\_\_\_ District Court of Bexar County, Texas. It is further ordered that the Clerk of this Court transmit to the Clerk of the \_\_\_\_\_ District Court of Bexar County, Texas, certified copies of the original papers in this cause and a transcript of all proceedings had herein, duly certified, and that costs incurred in this Court be taxed against Plaintiff.

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Signed on March 13, 1978.

/s/ THOMAS STOVALL, JR.  
Judge Presiding

APPROVED AS TO FORM:

Southern Pacific Transportation Company

By: /s/ W. T. WOMBLE  
W. T. Womble  
Attorney for Defendant

Schmidt & Matthews

By: /s/ JAMES H. BRANNON  
W. Douglas Matthews  
Attorney for Plaintiff

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IN THE  
COURT OF CIVIL APPEALS  
TWELFTH SUPREME JUDICIAL DISTRICT  
OF TEXAS AT TYLER

JUDGMENT RENDERED MAY 3, 1979

1210 FREDERICK J. HOPMANN VS. SOUTHERN  
PACIFIC TRANSPORTATION COMPANY —  
Appeal from 113th Judicial District Court of  
Harris County

AFFIRMED—Opinion by Associate Justice  
James H. Moore

THIS CAUSE came on to be heard on the transcript  
of the record; and the same being inspected it is the  
opinion of the Court that there was no error in the judg-  
ment.

It is therefore ORDERED, ADJUDGED and DE-  
CREED that the judgment of the Court below sustaining  
Appellee's plea of privilege and ordering that the cause  
be transferred to a District Court of Bexar County, be in  
all things affirmed; that the Appellee, Southern Pacific  
Transportation Company, recover of and from the appel-  
lant, Frederick J. Hopmann, and from Fidelity and De-  
posit Company of Maryland, surety upon appellant's  
appeal bond, all costs in this behalf expended, both in  
this Court and the Court below for all of which execu-  
tion may issue, and that this decision be certified to the  
court below for observance.

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COURT OF CIVIL APPEALS  
Twelfth Supreme Judicial District  
306 County Courthouse  
Tyler, Texas 75702

Notice of Judgment

Barbara A. Holman  
Clerk  
(214) 593-8471

May 31, 1979

Mr. James H. Brannon  
Schmidt & Matthews  
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723 Main Street  
Houston, TX 77002

Mr. W. T. Womble  
Attorney at Law  
913 Franklin, Suite 510  
Houston, TX 77002

Gentlemen:

You are hereby notified that, in the case of FRED-  
ERICK J. HOPMANN vs. SOUTHERN PACIFIC  
TRANSPORTATION COMPANY our No. 1210, from  
Harris County, the following decision and order was this  
day made and entered by this Court:

Motion Docket No. 2900:

"Appellant's Motion for Rehearing having been duly  
considered, it is ORDERED that said motion be, and  
hereby is overruled."

Respectfully yours,

/s/ BARBARA A. HOLMAN  
Clerk